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In the Supreme Court of the United States

OCTOBER TERM 1935

No. —

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, DANVILLE, ILLINOIS, AND THE VETERANS' ADMINISTRATION, PETITIONERS

v.

HARVEY M. WOOD, AS ADMINISTRATOR OF THE ESTATE OF WALTER SEARLES, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the petitioners, the National Home for Disabled Volunteer Soldiers, Danville, Illinois, and the Veterans' Administration, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above case on February 19, 1936 (R. 42), affirming, except for one item, the judgment of the United States District Court for the Eastern District of Illinois.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Illinois (R. 18–23) is

not officially reported. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 38) is reported in 81 F. (2d) 963.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered February 19, 1936 (R. 42). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an accumulated pension fund, credited to an inmate of the National Home for Disabled Volunteer Soldiers and standing in the Treasury in the name of the treasurer of such home, becomes payable to the post fund of such home at the death of the inmate, who left surviving him no widow, minor children, dependent mother or father, or whether such fund is a part of the estate of the inmate which may upon his death be recovered by his administrator.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 13–17.

STATEMENT

On February 26, 1932, a suit was instituted both against the National Home for Disabled Volunteer Soldiers, Danville, Illinois, petitioner herein, the Veterans' Administration Home, Danville, Illinois,

Ralph W. Jones, as accountant of the Veterans' Administration Home, Danville, Illinois, and as Treasurer of the National Home for Disabled Volunteer Soldiers, Danville, Illinois, and Walter T. Christy, as Special Disbursing Agent of said Veterans' Administration Home, Danville, Illinois, Respondent, who was plaintiff therein, is administrator of the estate of Walter Searles, deceased, a pensioner (R. 12). The facts, which were stipulated, may be summarized as follows:

Walter Searles, the decedent, was duly enrolled as a member of the National Home for Disabled Volunteer Soldiers at Danville, Illinois, on October 19, 1924. Thereafter, until his death on September 16, 1926, certain amounts granted and allowed him under the pension laws of the United States were paid in installments of $72.00 per month to the Treasurer of the Danville branch of the National Home for Volunteer Soldiers. (R. 13–14.) At the time of his death there was on deposit to his credit with the Danville branch approximately $1,800, and at the time of the filing of the suit there remained, after certain deductions concerning which there was no question, the sum of $1,546.47 (R. 14). Walter Searles died intestate, leaving as his only heir at law a son, Herbert A. Searles, who was not a minor (R. 15).

Within one year following the death of Walter Searles, Herbert A. Searles, his legal heir, made demand upon the National Home for Disabled Volunteer Soldiers for the payment of the pension

fund (R. 16). Thereafter, on March 23, 1931, demand was made upon the Veterans' Administration by the respondent and by Herbert A. Searles for the allowance of the sum of money remaining in the hands of the Veterans' Administration or its proper officials as accrued pension money due Walter Searles (R. 15). On March 25, 1931, the Veterans' Administration refused to accede to this demand (R. 16).

On January 26, 1935, the District Court entered judgment against the petitioners, the National Home for Disabled Volunteer Soldiers, Danville, Illinois, and the Veterans' Administration,[1] in the sum of $2,184.63, which represented the sum on deposit with the treasurer of the home plus interest, and costs of the suit. Judgment was not entered against the Veterans' Administration Home, Danville, Illinois, or against Ralph W. Jones or Walter T. Christy. (R. 26.) On appeal this judgment was modified by refusing to allow respondent costs, and, as modified, affirmed (R. 42).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that on the death of an inmate of a National Home for Disabled Volunteer Soldiers without leaving a wife, minor children,

[1] The Veterans' Administration had not been joined as a defendant. See *infra*, pp. 8–9.

father or mother surviving him, accrued pension money in the hands of the treasurer of the home passed to the inmate's administrator, and not to the post fund of the home.

2. In holding that the Act of June 25, 1910, and not the Act of July 1, 1902, controlled the disposition of such fund.

3. In affirming the judgment of the District Court.

REASON FOR GRANTING THE WRIT

The Act of July 1, 1902, (c. 1351, 32 Stat. 564; U. S. C., Title 24, Sec. 139) *infra,* p. 15, provided that the balance of any pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death "shall be paid to his widow, minor children or dependent mother or father in the order named," and that should none of the individuals therein named be discovered within one year from the time of the death of the pensioner, the balance should be paid to the post fund of the branch of the National Home of which the pensioner was a member at the time of his death. Admittedly, the decedent had no relatives within the above classification, and, if the statute be still in force, it precludes the payment of any pension money to the respondent in the instant case. The court below, however, held that the Act of July 1, 1902, was modified by the Act of June 25, 1910, (c. 384, 36 Stat. 703; U. S. C., Title 24, Sec. 136) *infra*, pp. 15–16, to allow an heir at law

or next of kin to recover unpaid pension moneys provided that application for the payment of such moneys was made within five years after the death of the member.

This decision is in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Durack* v. *National Home for Disabled Volunteer Soldiers,* 44 F. (2d) 516. The court there held, in circumstances identical with those in the instant case, that the Act of 1902 and not the Act of 1910 was controlling. This conflict was specifically noted by the court below, which stated (R. 40): "We reach this conclusion with that reluctance and hesitation which of necessity is induced by the contrary view of the Circuit Court of Appeals for the First Circuit, as announced in *Durack* v. *National Home for Disabled Volunteer Soldiers,* 44 F. (2d) 516."

Furthermore, it is submitted that the decision below is erroneous. The Act of 1902 provided specifically that accrued pension funds over which the United States had plenary control, should pass only to a limited class of relatives. The Act of 1910 was a general statute regulating the disposition of *all property* of the pensioner which might have come into the hands of the treasurer or other officers of the Home. Repeals by implication are not favored (*North American Commercial Co.* v. *United States,* 171 U. S. 110, 130; *United States* v. *Greathouse,* 166 U. S. 601, 605) and particularly should not be here when an implied repeal will

make the statute inconsistent with other provisions of the statutes dealing with the distribution of pension money. Sections 53, 96, U. S. C., Title 38. Moreover, the present decision is contrary to long continued administrative interpretation. 4 Comp. Gen. 752 (1925); XIX Comp. Treas. 388 (1913).

Finally, the question involved is one of appreciable administrative importance. There are now pending many similar suits, and, unless an authoritative decision is made by this Court, many other actions will doubtless be brought.

The form of the proceedings in the present case is somewhat peculiar and requires comment. By the Act of July 3, 1930 (c. 863, 46 Stat. 1016; U. S. C., Title 38, Sec. 11d), *infra*, pp. 16–17, Congress provided that the corporation known as the National Home for Disabled Volunteer Soldiers should be consolidated with the United States Veterans Bureau and the Bureau of Pensions into the Veterans' Administration, and that when the consolidation was proclaimed by the President the corporation should cease to exist. Under date of June 21, 1930, the President issued this proclamation (Executive Order No. 5398), and from that date the corporation has had no existence, and all its assets have been in the possession of the Federal Government.

By Section 5 (b) of the Act of July 3, 1930, however, the United States assumed all the valid

and subsisting obligations of the defunct corporation, and provided that the obligations might be enforced—

> by suit in the Court of Claims or in the district courts of the United States according to the ordinary provisions of law governing actions against the United States, and such courts shall have the power to enter judgment against the United States, with interest, in the same manner and to the same extent as if said corporation were party defendant.

When respondent filed his declaration on February 26, 1932 (R. 5), he did not name the United States as defendant, as he should have done had he followed the literal requirements of the Act. However, he did advert to the fact that the corporation was—

> dissolved and all its duties, obligations, rights, powers, etc., transferred to the Veterans Administration of the City of Washington, District of Columbia, as a part of the Government of the United States (R. 5).

This may be taken as an indirect and inartistic way of making the United States, through the Veterans' Administrafion, a party defendant, even though not named in the caption. It seems to have been so construed by the trial judge, who directed that the judgment run against the defunct corporation and the Veterans' Administration (R. 26) which he apparently considered to be the Government as represented by that branch most directly

concerned with the administration of veterans' affairs. Moreover, it seems to have been so interpreted by the United States Attorney, who thereafter proceeded in the name of the United States of America (R. 26, 27, 28, 29, 31).

However, even if the United States was not thus made a party, nevertheless the District Court and this Court have jurisdiction of the present case. The action is, according to the caption, against the defunct corporation, the Veterans' Administration Home, which is merely a group of buildings having no independent legal status, and two persons holding positions under the United States, in their official capacities. Actually, however, the suit has been defended throughout by the United States Attorney. It has been treated as one in which the United States was the real party defendant; indeed, in the motion for a new trial (R. 25), and in all subsequent proceedings, action has been taken in the name of the United States of America (See R. 26, 27, 28, 29, 31). Any judgment entered in favor of respondent would of necessity be a judgment against the United States, which now has possession of all the assets of the defunct corporation, including those claimed in the present case (Act of July 3, 1930, c. 863, 46 Stat. 1016; U. S. C., Title 38, Sec. 11d), for the individuals were not sued in their individual capacity, and no judgment was entered against them in either capacity (R. 26). As the court below pointed out in its opinion (R. 41),

petitioners urged in opposition to the allowance of interest and costs that the suit was in fact one against the United States, and on this basis succeeded in having costs eliminated from the judgment of the District Court (R. 42). In such circumstances it is submitted that the court below was correct in holding that the suit, although formally against others, was in fact against the United States. Cf. *Minnesota* v. *Hitchcock,* 185 U. S. 373; *State Highway Commission of Wyoming* v. *Utah Construction Co.,* 278 U. S. 194; *United States* v. *Golden,* 34 F. (2d) 367, 376 (C. C. A. 10th); *Schroeder* v. *Davis,* 32 F. (2d) 454 (C. C. A. 8th).

A similar situation was presented in *Minnesota* v. *Hitchcock,* 185 U. S. 373. An original suit was there brought in this Court by the State of Minnesota against the Secretary of the Interior and the Commissioner of the General Land Office, to enjoin them from selling certain lands. The Court found that it had jurisdiction, basing its conclusion upon the fact that the United States, although not named as a party, was in fact the real defendant in the action, and that the Constitution extends the judicial power of the United States to controversies "to which the United States shall be a party." The Court, in other words, treated the case as one against the United States, even though it was not named as defend-

ant.[2] Cf. *United States Fidelity & Guaranty Co.* v. *Kenyon,* 204 U. S. 349, and cases cited. The same rule has been applied in cases in which the jurisdiction of the Federal court rests upon diversity of citizenship. Jurisdiction there depends upon whether the citizenship of the real parties in interest is diverse, and formal parties of record will be ignored, both to sustain jurisdiction (*Wormley* v. *Wormley,* 8 Wheat. 421; *Browne* v. *Strode,* 5 Cranch 303) and to deny it (*Mitchell* v. *Maurer,* 293 U. S. 237, 242).

Applying the principle of these cases to the present action, the jurisdiction of the lower courts and of this Court rests upon the fact that it is actually one against the United States. Jurisdiction over such suits has been expressly vested in the district courts by the Act of July 3, 1930, *infra,* pp. 16–17, and by the Tucker Act (Act

[2] The force of this analogy is not weakened by the opinion in *Williams* v. *United States*, 289 U. S. 553, 568, 572, which stated that *Minnesota* v. *Hitchcock* was erroneous in holding that the judicial power granted under Article III extended to suits to which the United States was a defendant, even if it had consented. There is no intimation in the *Williams* case that it disapproved of the fact that the United States was treated as the actual defendant even though not named as a party. Nor does the statement in the *Williams* case deprive this Court of appellate jurisdiction to review decisions of lower courts entered against the United States without its consent, for they exercise a judicial power, even though it is not derived from Article III of the Constitution. See 289 U. S. at 579–581.

of March 3, 1887, c. 359, 24 Stat. 505; U. S. C., Title 28, Sec. 41, par. 20). Whatever formal defects may have existed in the way of service, etc., have been cured by the general appearance by the United States. *Farrar and Brown* v. *United States,* 3 Pet. 459; *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19; *United States* v. *New York & O. S. S. Co.,* 216 Fed. 61 (C. C. A. 2d). It is submitted, therefore, that this Court has jurisdiction.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

MAY 1936.

APPENDIX

Act of February 26, 1881, c. 80, 21 Stat. 350, 351 (U. S. C., Title 24, Sec. 138 and note):

> SEC. 2. All pensions payable, or to be paid under this act, to pensioners who are inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the treasurer or treasurers of said home, upon security given to the satisfaction of the managers to be disbursed for the benefit of the pensioners without deduction for fines or penalties under regulations to be established by the managers of the home; said payment to be made by the pension agent upon a certificate of the proper officer of the home that the pensioner is an inmate thereof and is still living. Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid over to him; and in case of his death at the home, the same shall be paid to the widow, or children or in default of either to his legal representatives.

Act of August 7, 1882, c. 433, 22 Stat. 302, 322, 323:

> * * * And section two of the act entitled "An act making appropriations for the payment of invalid and other pensions of the United States for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for deficiencies, and for other purposes," approved February twenty-sixth, eighteen hundred and eighty-one, is hereby revived and continued in force.

Act of August 17, 1912, c. 301, 37 Stat. 311, 313 (U. S. C., Title 38, Sec. 52):

> SEC. 6. That nothing in this Act shall be construed as amending or repealing that portion of the sundry civil appropriation Act for the fiscal year eighteen hundred and eighty-three (Statutes at Large, Volume Twenty-two, page three hundred and twenty-two) concerning the payment of pensions due inmates of the National Home for Disabled Volunteer Soldiers.

Act of March 3, 1883, c. 130, 22 Stat. 564 (U. S. C., Title 24, Sec. 52).

> SEC. 4. That any inmate of the Home who is receiving a pension from the government, and who has a child, wife, or parent living, shall be entitled, by filing with the pension agent from whom he receives his money a written direction to that effect, to have his pension, or any part of it, paid to such child, wife, or parent. The pensions of all who now are or shall hereafter become inmates of the Home, except such as shall be assigned as aforesaid, shall be paid to the treasurer of the Home. The money thus derived shall not become a part of the funds of the Home, but shall be held by the treasurer in trust for the pensioner to whom it would otherwise have been paid, and such part of it as shall not sooner have been paid to him shall be paid to him on his discharge from the institution. The board of commissioners may from time to time pay over to any inmate such part of his pension-money as they think best for his interest and consistent with the discipline and good order of the Home, but such pensioner shall not be entitled to demand or have the same

so long as he remains an inmate of the Home. In case of the death of any pensioner, any pension money due him and remaining in the hands of the treasurer shall be paid to his legal heirs, if demand is made within three years; otherwise the same shall escheat to the Home.

Act of July 1, 1902, c. 1351, 32 Stat. 552, 564 (U. S. C., Title 24, Sec. 139):

Hereafter any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named, and should no widow, minor child, or dependent parent be discovered within one year from the time of the death of the pensioner, said balance shall be paid to the post fund of the Branch of said National Home of which the pensioner was a member at the time of his death, to be used for the common benefit of the members of the Home under the direction of the Board of Managers, subject to future reclamation by the relatives hereinbefore designated, upon application filed with the Board of Managers within five years after the pensioner's death.

Act of June 25, 1910, c. 384, 36 Stat. 703, 736 (U. S. C., Title 24, Sec. 136):

Hereafter the application of any person for membership in the National Home for Disabled Volunteer Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said

applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, the proceeds to be disposed of and distributed among the several branches as may be ordered by said Board of Managers, and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. The Board of Managers is directed to so change the form of application for membership as to give reasonable notice of this provision to each applicant and as to contain the consent of the applicant to accept membership upon the conditions herein provided.

Act of July 3, 1930, c. 863, 46 Stat. 1016, 1017 (U. S. C., Title 38, Sec. 11d):

SEC. 5. (a) When the consolidation and coordination herein provided for shall have been effected in the Veterans' Administration the President shall so declare by proclamation or order, whereupon the corporation known as the National Home for Disabled Volunteer Soldiers and the Board of Managers shall cease to exist.

(b) All contracts and other valid and subsisting obligations of the corporation, the

National Home for Disabled Volunteer Soldiers, shall continue and be and become obligations of the United States, and the United States shall be considered as substituted for said corporation with respect to all such demands either by or against said corporation, unless and until they shall thereafter be superseded or discharged according to law. The outstanding obligations assumed by the United States by virtue of the provisions of this subdivision may be enforced by suit in the Court of Claims or in the district courts of the United States according to the ordinary provisions of law governing actions against the United States, and such courts shall have the power to enter judgment against the United States, with interest, in the same manner and to the same extent as if said corporation were party defendant. No such suit shall be maintained upon any cause of action existing at the time of the dissolution of said corporation or arising simultaneously therewith, unless brought within two years from the time of such dissolution.

U. S. GOVERNMENT PRINTING OFFICE: 1936